

Refuse Compactor Service, Inc. and United Automobile, Aerospace and Agricultural Implement Workers. Cases 31-CA-18073, 31-CA-18175, 31-CA-18245, 31-CA-18287, 31-CA-18385, and 31-CA-18497

December 19, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On May 13, 1993, the National Labor Relations Board issued a Decision and Order in this proceeding,¹ in which it ordered the Respondent, inter alia, to make whole unfair labor practice strikers who unconditionally offered to return to work for any loss of earnings suffered by reason of the Respondent's discrimination against them. On August 1, 1995, the United States Court of Appeals for the Ninth Circuit entered a judgment enforcing the Board's Order. A controversy having arisen over the amount of backpay due, the Regional Director for Region 31 issued a compliance specification and notice of hearing, identifying certain individuals as the discriminatees who are entitled to backpay, alleging the amounts of backpay due, and notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations. The Respondent subsequently filed an answer and an amended answer to the compliance specification.

On May 7, 1996, the General Counsel filed with the Board a Motion to Transfer Case to the Board, to Strike Portions of Respondent's Answer, and for Summary Judgment and Order to Show Cause, with exhibits attached. On May 9, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On May 22, the Respondent filed a memorandum in opposition to the General Counsel's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion to Strike Portions of the Amended Answer and for Partial Summary Judgment

1. The compliance specification identifies Augustine Godoy Lopez and Carlos Ramirez as two of the discriminatees entitled to backpay. In the underlying unfair labor practice proceeding, the Board affirmed the judge's findings that the Respondent unlawfully terminated Lopez during the unfair labor practice strike and that Ramirez did not abandon his job with the Re-

spondent by accepting other employment during the strike. In its amended answer, the Respondent attempts to relitigate these findings. It is well settled that "[i]ssues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding," *Transport Service Co.*, 314 NLRB 458, 459 (1994). Accordingly, we shall grant the General Counsel's motion to strike these paragraphs of the amended answer.

2. Section 102.56(b) and (c) of the Board's Rules and Regulations states:

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

For purposes of computing gross backpay amounts for each discriminatee, the compliance specification relies on the earnings of specifically identified

¹ 311 NLRB 12.

replacement/representative employees. In its amended answer, the Respondent avers generally that the gross backpay amounts are unreasonable because of an alleged "severe reduction in business associated with the strike and subsequent events." The Respondent admits that an appropriate measure of backpay could be the earnings of a replacement employee, but it further generally contends that there were no replacement employees for several of the discriminatees and that certain replacement employees identified by the compliance specification were misidentified or mismatched. Subsequent paragraphs of the amended answer specifically identify the contested replacement employees and state the Respondent's reasons for disagreeing with the compliance specification. Finally, an appendix to the amended answer includes specific alternative backpay computations for each discriminatee. The alternative computations are consistent with specific arguments made in the amended answer and reiterated in the opposition to the General Counsel's motion.

The General Counsel moves to strike the Respondent's amended answer as to the replacement issues and related backpay computations, contending that the Respondent's amended answer lacks the specificity required by Section 102.56(b) of the Board's Rules and Regulations. We disagree. We find that the Respondent has sufficiently pled, with appropriate supporting figures, both its general defense of a decline in business resulting in a lack of available work during the backpay period and its specific challenges to the compliance specification's identification of appropriate replacement employees and earnings for computing gross backpay amounts. We shall therefore deny the motion to strike and shall permit litigation of these issues in a hearing on the specification.

3. The Respondent also generally alleges that several of the discriminatees did not engage in a sufficiently diligent search for interim employment during the backpay period. It further indicates that it will litigate the amount of interim earnings set forth in the compliance specification for several discriminatees. The General Counsel requests the Board to issue an Order to Show Cause requiring the Respondent to proffer evidence regarding the discriminatees' search for work.

Absent a sufficient evidentiary showing, the General Counsel contends that the Board should find the interim earnings allegation of the specification to be true without a hearing.

We deny the General Counsel's request. "It is well settled that general denials of allegations involving interim earnings are sufficient to warrant a hearing on those issues." *Castaways Management*, 303 NLRB 374, 375 (1991). We shall therefore permit the Respondent to litigate interim earnings matters at a hearing on the compliance specification.

In sum, we grant only the General Counsel's motion to strike paragraph 5,d of the amended answer, to the extent that it may be construed as attempting to relitigate the validity of the Respondent's discharge of Augustine Godoy Lopez, and paragraph 7 of the amended answer, to the extent that the Respondent seeks to relitigate whether Carlos Ramirez voluntarily quit his job during the strike. We shall deny the remainder of the General Counsel's motion.

ORDER

It is ordered that the General Counsel's motion to strike those portions of the amended answer seeking to relitigate issues involving discriminatees Augustine Godoy Lopez and Carlos Ramirez that were decided in the underlying unfair labor practice proceeding is granted.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 31 for the purposes of issuing a notice of hearing and scheduling the hearing before an administrative law judge, for the taking of evidence concerning factual issues properly raised by the Respondent's amended answer to the compliance specification.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.